CIVIL JURY INSTRUCTIONS

Judicial Council of California

Advisory Committee on Civil Jury Instructions

Revisions

Spring 2006

CIVIL JURY INSTRUCTIONS—Spring 2006 Update
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EVIDENCE

218. Statements Made to Physician (Previously Existing Condition) (*Revised*)

[*Insert name of health-care provider***] has testified that [***insert name of patient***] made statements to [him/her] about [***name of patient***]'s medical history. These statements helped [***name of health-care provider***] diagnose the patient's condition. You can use these statements to help you examine the basis of [***name of health-care provider***]'s opinion. However, you cannot use them for any other purpose.**

[However, a statement by [*name of patient***] to [***name of health-care provider***] of [his/her] current medical condition may be considered as evidence of that medical condition.]**

Directions for Use

This instruction does not apply to, and should not be used for, a statement of the patient's then-existing physical sensation, mental feeling, pain, or bodily health. Such statements are admissible as an exception to the hearsay rule under Evidence Code section 1250. This instruction also does not apply to statements of a patient regarding a prior mental or physical state if he or she is unavailable as a witness. (Evid. Code, § 1251.)

This instruction also does not apply to, and should not be used for, statements of a party that are offered into evidence by an opposing party. Such statements are admissible as an exception to the hearsay rule under Evidence Code section 1220. See No. CACI 212, *Statements of a Party Opponent.*

Sources and Authority

- Statements pointing to the cause of a physical condition may be admissible if they are made by a patient to a physician. The statement must be required for proper diagnosis and treatment and is admissible only to show the basis of the physician's medical opinion. (*People v. Wilson* (1944) 25 Cal.2d 341, 348 [153 P.2d 720]; *Johnson v. Aetna Life Insurance Co.* (1963) 221 Cal.App.2d 247, 252 [34 Cal.Rptr. 484]; *Willoughby v. Zylstra* (1935) 5 Cal.App.2d 297, 300–301 [42 P.2d 685].)

- Evidence Code section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

- Evidence Code section 1250(a) provides, in part:

  [E]vidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation ... is not made inadmissible by the hearsay rule when:

(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

(2) The evidence is offered to prove or explain acts or conduct of the declarant.

- Evidence Code section 1251 provides, in part:

  [E]vidence of a statement of the declarant's state of mind, emotion, or physical sensation ... at a time prior to the statement is not made inadmissible by the hearsay rule if:

  (a) The declarant is unavailable as a witness; and

  (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay § 196

2 California Trial Guide, Unit 40, *Hearsay*, § 40.42 (Matthew Bender)

CONTRACTS

303. Breach of Contract—Essential Factual Elements (*Revised*)

To recover damages from [*name of defendant***] for breach of contract, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into a contract;**

2. **That [***name of plaintiff***] did all, or substantially all of the significant things that the contract required [him/her/it] to do [or that [he/she/it] was excused from ~~having to do~~ doing those things];**

3. **[That ~~all conditions required~~ everything required by the contract for [***name of defendant***]'s performance had occurred;]**

4. **That [***name of defendant***] failed to do something that the contract required [him/her/it] to do; and**

5. **That [***name of plaintiff***] was harmed by that failure.**

Directions for Use

Read this instruction in conjunction with CACI No. 300, *Essential Factual Elements*. In many cases, some of the above elements may not be contested. In those cases, users should delete the elements that are not contested so that the jury can focus on the contested issues.

Element 3 is intended for cases where conditions for performance are at issue. Not every contract has conditions for performance.

If the allegation is that the defendant breached the contract by doing something that the contract prohibited, then change element 4 to the following: "That [*name of defendant*] did something that the contract prohibited [him/her/it] from doing."

Equitable remedies are also available for breach. "As a general proposition, '[t]he jury trial is a matter of right in a civil action at law, but not in equity. [Citations.]' " (*C & K Engineering Contractors v. Amber Steel Co., Inc.* (1978) 23 Cal.3d 1, 8 [151 Cal.Rptr. 323, 587 P.2d 1136]; *Selby Contractors, Inc. v. McCarthy* (1979) 91 Cal.App.3d 517, 524 [154 Cal.Rptr. 164].) However, juries may render advisory verdicts on these issues. (*Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 670–671 [111 Cal.Rptr. 693, 517 P.2d 1157].)

Sources and Authority

- A complaint for breach of contract must include the following: (1) the existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4)

damages to plaintiff therefrom. (*Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913 [92 Cal.Rptr. 723].) Additionally, if the defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove that the event transpired. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)

- Civil Code section 1549 provides: "A contract is an agreement to do or not to do a certain thing." Courts have defined the term as follows: "A contract is a voluntary and lawful agreement, by competent parties, for good consideration, to do or not to do a specified thing." (*Robinson v. Magee* (1858) 9 Cal. 81, 83.)

- Section 1 of the Restatement Second of Contracts provides: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."

- "The wrongful, i.e., the unjustified or unexcused, failure to perform a contract is a breach. Where the nonperformance is legally justified, or excused, there may be a failure of consideration, but not a breach." (1 Witkin, Summary of California Law (9th ed. 1987) § 791, internal citations omitted.) "Ordinarily, a breach is the result of an intentional act, but negligent performance may also constitute a breach, giving rise to alternative contract and tort actions." (*Ibid.*)

- The doctrine of substantial performance does not apply to the party accused of the breach. Section 235(2) of the Restatement Second of Contracts provides: "When performance of a duty under a contract is due any non-performance is a breach." Comment (b) to section 235 states that "[w]hen performance is due, . . . anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial."

Secondary Sources

1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 791

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.50 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts* (Matthew Bender)

406. Apportionment of Responsibility (*Revised*)

More than one person's [negligence/fault], [including [*name of plaintiff***]'s], may have been a substantial factor in causing [***name of plaintiff***]'s harm. If so, you must decide how much responsibility each person has by ~~determining, on a percentage basis, the extent to which his or her [negligence/fault] contributed to causing the harm~~ assigning percentages of responsibility to any person listed on the verdict form whose negligence or other fault was a substantial factor in causing [***name of plaintiff***]'s harm. The percentages of responsibility must total 100 percent.**

You will make a separate finding of [*name of plaintiff***]'s total damages, if any. When you make this finding you should not consider any person's assigned percentage of responsibility.**

Directions for Use

Do not give the bracketed phrases if plaintiff's contributory negligence is not at issue.

Use "fault" if there is a need to allocate harm between defendants who are sued for conduct other than negligence, e.g., strict products liability.

See CACI No. VF-402, *Negligence—Fault of Plaintiff and Others at Issue*, for an example of how to draft a verdict form for a case involving multiple parties and their comparative fault.

Sources and Authority

- The Supreme Court has held that the doctrine of joint and several liability survived the adoption of comparative negligence: "[W]e hold that after Li, a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only 'in proportion to the amount of negligence attributable to the person recovering.' " (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 590 [146 Cal.Rptr. 182, 578 P.2d 899], citing *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226].)

- The Court in *American Motorcycle Assn.* also modified the equitable indemnity rule "to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis." (*American Motorcycle Assn., supra,* 20 Cal.3d at p. 591.)

- Proposition 51 modified the doctrine of joint and several liability to limit each defendant's liability for noneconomic damages to the proportion of each defendant's percentage of fault.

- Restatement (Third) of Torts: Apportionment Liability (Proposed Final Draft (Revised) March 22, 1999) section 7, comment (g) provides, in part: "Percentages of responsibility are

assigned by special verdict to any plaintiff, defendant, settlor, immune person, or other relevant person … whose negligence or other legally culpable conduct was a legal cause of the plaintiff's injury. The percentages of responsibility must total 100 percent. The factfinder makes a separate finding of the plaintiff's total damages. Those damages are reduced by the percentage of responsibility the factfinder assigns to the plaintiff. The resulting amount constitutes the plaintiff's 'recoverable damages.' "

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 51–55, pp. 112–116

1 Levy et al., California Torts, Ch. 4, Comparative Negligence, Assumption of the Risk, and Related Defenses, §§ 4.04–4.03, 4.07–4.08 (Matthew Bender)

5 Levy et al., California Torts, Ch. 74, Resolving Multiparty Tort Litigation, § 74.03 (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) §§ 1.52–1.59

4 California Trial Guide, Unit 90, Closing Argument, § 90.91 (Matthew Bender)

California Products Liability Actions, Ch. 2, Liability for Defective Products, § 2.14A, Ch. 9, Damages, § 9.01 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 300, Indemnity and Contribution (Matthew Bender)

11 California Points and Authorities, Ch. 115, Indemnity and Contribution (Matthew Bender)

16 California Points and Authorities, Ch. 165, Negligence, §§ 165.284, 165.380 (Matthew Bender)

454. Statute of Limitations Defense (Including Delayed Discovery Option) (*New*)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time limit set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s claimed [injury/harm] occurred before [***insert relevant date***].**

[If [*name of defendant***] proves that [***name of plaintiff***]'s claimed [injury/harm] occurred before [***insert relevant date***], [his/her/its] lawsuit was filed on time if [***name of plaintiff***] proves that before [***insert date***] [he/she/it] did not suspect or have reason to suspect that [his/her/its] injury was caused by wrongful conduct.]**

[If [*name of plaintiff***] suspected or had reason to suspect that [his/her/its] [injury/harm] was caused by wrongful conduct then the lawsuit was filed on time if [***name of plaintiff***] proves that before [***insert date***] a reasonable and diligent investigation would not have disclosed that [***specify wrongful cause or cause of action, e.g., "a medical device" or "inadequate medical treatment"***] contributed to [his/her/its] [injury/harm].]**

Directions for Use

The first paragraph of this instruction states the common law rule that an action accrues on the date of injury. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].)

The second bracketed paragraph should be given when plaintiff seeks to overcome the statute of limitations defense by asserting the "delayed discovery rule" or "discovery rule." Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should have suspected that the injury was caused by someone's wrongdoing. (*Jolly, supra,* 44 Cal.3d at pp. 1110–1111.)

The third bracketed paragraph is limited to cases that fall under *Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797, 808 [27 Cal.Rptr.3d 661, 110 P.3d 914]. The law requires a plaintiff, after suspecting his/her injury was wrongfully caused, to conduct a reasonable and diligent investigation to determine the cause(s) of the injury. Plaintiff is charged with knowledge of the information that would have been revealed by such an investigation. (*Fox, supra,* 35 Cal.4th at p. 808.) However, if a plaintiff's reasonable and diligent investigation discloses one kind of wrongdoing when the injury was caused by tortious conduct of a wholly different sort, the discovery rule postpones accrual of the limitations period on the newly discovered claim. (*Fox, supra,* 35 Cal.4th at p. 813 [Fact that plaintiff suspected her injury was caused by surgeon's negligence and timely filed action for medical negligence against health care provider did not preclude "discovery rule" from tolling accrual of limitations period on products' liability cause of action against medical staple manufacturer whose role in causing injury was not known and could not have been reasonably discovered within the applicable limitations period commencing from date of injury].)

Note that in some actions it is defendant's burden to negate delayed discovery in order to establish a statute of limitations defense, rather than plaintiff's burden to prove delayed discovery in order to overcome the limitations defense. (*Samuels v. Mix* (1999) 22 Cal.4th 1 [91 Cal.Rptr. 2d 273, 989 P.2d 701] [attorney malpractice actions].)

Sources and Authority

- "A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable. Developed to mitigate the harsh results produced by strict definitions of accrual, the common law discovery rule postpones accrual until a plaintiff discovers or has reason to discover the cause of action." (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661], internal citations omitted.)

- "[T]he plaintiff may discover, or have reason to discover, the cause of action even if he does not suspect, or have reason to suspect, the identity of the defendant. That is because the identity of the defendant is not an element of any cause of action. It follows that failure to discover, or have reason to discover, the identity of the defendant does not postpone the accrual of a cause of action, whereas a like failure concerning the cause of action itself does. 'Although never fully articulated, the rationale for distinguishing between ignorance' of the defendant and 'ignorance' of the cause of action itself 'appears to be premised on the commonsense assumption that once the plaintiff is aware of' the latter, he 'normally' has 'sufficient opportunity,' within the 'applicable limitations period,' 'to discover the identity' of the former. He may 'often effectively extend[]' the limitations period in question 'by the filing' and amendment 'of a Doe complaint' and invocation of the relation-back doctrine. 'Where' he knows the 'identity of at least one defendant . . ., [he] must' proceed thus." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 399 [87 Cal.Rptr.2d 453, 981 P.2d 79], internal citations and footnote omitted.)

- "In tort actions, the statute of limitations commences when the last element essential to a cause of action occurs. The statute of limitations does not begin to run and no cause of action accrues in a tort action until damage has occurred. If the last element of the cause of action to occur is damage, the statute of limitations begins to run on the occurrence of 'appreciable and actual harm, however uncertain in amount,' that consists of more than nominal damages. '. . . [O]nce plaintiff has suffered actual and appreciable harm, neither the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation.' Cases contrast actual and appreciable harm with nominal damages, speculative harm or the threat of future harm. The mere breach of duty—causing only nominal damages, speculative harm or the threat of future harm not yet realized—normally does not suffice to create a cause of action." (*San Francisco Unified School Dist. v. W. R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1326 [44 Cal.Rptr.2d 305], internal citations omitted)

- " '[R]esolution of the statute of limitations issue is normally a question of fact … .' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

503. Psychotherapist's Duty to Warn—Essential Factual Elements (*Revised*)

[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she] did not warn [***name of plaintiff***] ~~or~~ and a law enforcement agency about [***name of third party***]'s threat of violent behavior. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***] was a psychotherapist;**

2. That [*name of third party***] was [***name of defendant***]'s patient;**

3. That [*name of third party***] communicated a serious threat of physical violence to [***name of defendant***];**

4. That [*name of defendant***] knew or should have known that [***name of plaintiff***] was [***name of third party***]'s intended victim; and**

5. That [*name of defendant***] did not make reasonable efforts to warn [***name of plaintiff***] and a law enforcement agency about the threat.**

Sources and Authority

- Civil Code section 43.92 provides:
  (a) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.
  (b) If there is a duty to warn and protect under the limited circumstances specified above, the duty shall be discharged by the psychotherapist making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.

- Civil Code section 43.92 was enacted to limit the liability of psychotherapists under *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334], regarding a therapist's duty to warn an intended victim. (*Barry v. Turek* (1990) 218 Cal.App.3d 1241, 1244–1245 [267 Cal.Rptr. 553].) Under this provision, "[p]sychotherapists thus have immunity from *Tarasoff* claims except where the plaintiff proves that the patient has communicated to his or her psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." (*Id.* at p. 1245.)

- Failure to inform a law enforcement agency concerning a homicidal threat made by a patient against his work supervisor did not abrogate the "firefighter's rule" and, therefore, did not

render the psychiatrist liable to a police officer who was subsequently shot by the patient. (*Tilley v. Schulte* (1999) 70 Cal.App.4th 79, 85–86 [82 Cal.Rptr.2d 497].)

- "When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864]; see also *Ewing v. Northridge Hospital Medical Center* (2004) 120 Cal.App.4th 1289, 1293 [16 Cal.Rptr.3d 591].

Secondary Sources

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

11 California Points and Authorities, Ch. 117, *Insane and Incompetent Persons* (Matthew Bender)

610. Statute of Limitations Affirmative Defense—Attorney Malpractice—One-Year Limit (Civ. Code, § 340.6) (*New*)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. [***Name of plaintiff***]'s lawsuit was filed too late if [***name of defendant***] proves that before [***insert date one year and one day before date of filing***] [***name of plaintiff***] knew or with reasonable diligence should have discovered the facts of [***name of defendant***]'s wrongful act or omission,**

[unless [*name of plaintiff***] proves:**

[*Choose one or more of the following three options:***]**

[that [he/she/it] was not actually injured until after [*insert date one year and one day before date of filing***].]**

[that after [*insert date one year and one day before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred.]**

[that after [*insert date one year and one day before date of filing***] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit].]**

Directions for Use

Use CACI No. 611, *Statute of Limitations Defense—Attorney Malpractice—Four-Year Limit (Civ Code, § 340.6)*, if the four-year limitation provision is at issue.

Sources and Authority

- Civil Code section 340.6 provides:

  (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
  (1) The plaintiff has not sustained actual injury;
  (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and

(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10, internal citations omitted.)

- "[D]efendant, if he is to avail himself of the statute's one-year-from-discovery limitation defense, has the burden of proving, under the 'traditional allocation of the burden of proof' that plaintiff discovered or should have discovered the facts alleged to constitute defendant's wrongdoing more than one year prior to filing this action." (*Samuels, supra,* 22 Cal.4th at pp. 8–9, internal citations omitted.)

- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, footnote omitted.)

- "We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action." (*Neel, supra,* 6 Cal.3d at p. 194.)

PROFESSIONAL MALPRACTICE

611. Statute of Limitations Affirmative Defense—Attorney Malpractice—Four-Year Limit (Civ Code, § 340.6) (*New*)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. [***Name of plaintiff***]'s lawsuit was filed to late if [***name of defendant***] proves that [his/her/its] wrongful act or omission occurred before [***insert date four years and one day before date of filing***],**

[unless [*name of plaintiff***] proves:**

[*Choose one or more of the following four options:***]**

[that [he/she/it] was not actually injured until after [*insert date four years and one day before date of filing***].]**

[that after [*insert date four years and one day before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred.]**

[that after [*insert date four years and one day before date of filing***] [***name of defendant***] knowingly concealed the facts constituting the wrongful act or omission.]**

[that after [*insert date four years and one day before date of filing***] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit].]**

Directions for Use

Use CACI No. 610, *Statute of Limitations Defense—Attorney Malpractice—One-Year Limit (Civ Code, § 340.6)*, if the one-year limitation provision is at issue.

Sources and Authority

- Civil Code section 340.6 provides:

  (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
  (1) The plaintiff has not sustained actual injury;

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and
(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10, internal citations omitted.)

- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, footnote omitted.)

- "We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action." (*Neel, supra,* 6 Cal.3d at p. 194.)

2331. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment—Essential Factual Elements (*Revised*)

[*Name of plaintiff***] claims that [***name of defendant***] breached the obligation of good faith and fair dealing by unreasonably [failing to pay/delaying payment of] insurance benefits. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] suffered a loss covered under an insurance policy with [***name of defendant***];**

2. **That [***name of defendant***] was notified of the loss;**

3. **That [***name of defendant***] unreasonably [failed to pay/delayed payment of] policy benefits;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s unreasonable [failure to pay/delay in payment of] policy benefits was a substantial factor in causing [***name of plaintiff***]'s harm.**

An insurer that denies benefits or delays payment incorrectly because of a mistaken belief or a disagreement about whether payment is required that is both sincere and reasonable does not breach the obligation of good faith and fair dealing. The insurer's conduct breaches this obligation only if it includes a conscious and deliberate act that unfairly frustrates the reasonable expectations of the insured.

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case. For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300, et seq.).

Sources and Authority

- Where an insurer "fails to deal *fairly and in good faith* with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. … [¶] … [W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." (*Gruenberg v. Aetna Insurance Co.* (1973) 9 Cal.3d 566, 574–575 [108 Cal.Rptr. 480, 510 P.2d 1032], italics in original.)

- "[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding

benefits must have been unreasonable or without proper cause." (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1151 [271 Cal.Rptr. 246], internal citations omitted.)

- "[T]he elements of the tort cannot be defined by the terms of the policy; for there to be a breach of the implied covenant, the failure to bestow benefits must have been under circumstances or for reasons which the law defines as tortious. … '[T]he mere denial of benefits, however, does not demonstrate bad faith.' " (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 15 [221 Cal.Rptr. 171], internal citation omitted.)

- "[A]n insurer's erroneous failure to pay benefits under a policy does not necessarily constitute bad faith entitling the insured to recover tort damages. '[T]he ultimate test of [bad faith] liability in the first party cases is whether the refusal to pay policy benefits was unreasonable.' … In other words, 'before an [insurer] can be found to have acted tortiously, i.e., in bad faith, in refusing to bestow policy benefits, it must have done so "without proper cause." ' " (*Opsal v. United Services Automobile Assn.* (1991) 2 Cal.App.4th 1197, 1205 [10 Cal.Rptr.2d 352], citations omitted.)

- "[A]n insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract." (*Chateau Chamberay Homeowners Assn. v. Associated International Insurance Co.* (2001) 90 Cal.App.4th 335, 347 [108 Cal.Rptr.2d 776].)

- "'The mistaken [or erroneous] withholding of policy benefits, if reasonable or if based on a legitimate dispute as to the insurer's liability under California law, does not expose the insurer to bad faith liability.' Without more, such a denial of benefits is merely a breach of contract." (*CalFarm Ins. Co. v. Krusiewicz* (2005) 131 Cal.App.4th 273, 286 [31 Cal.Rptr.3d 619], internal citations omitted.)

- "An insurance company may not ignore evidence which supports coverage. If it does so, it acts unreasonably towards its insured and breaches the covenant of good faith and fair dealing." (*Mariscal v. Old Republic Life Insurance Co.* (1996) 42 Cal.App.4th 1617, 1624 [50 Cal.Rptr.2d 224].)

- "We conclude … that the duty of good faith and fair dealing on the part of defendant insurance companies is an absolute one. … [T]he nonperformance by one party of its contractual duties cannot excuse a breach of the duty of good faith and fair dealing by the other party while the contract between them is in effect and not rescinded." (*Gruenberg, supra,* 9 Cal.3d at p. 578.)

- "[T]he insurer's duty to process claims fairly and in good faith [is] a nondelegable duty." (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 848 [263 Cal.Rptr. 850].)

- "[A]llegations which assert [a claim for bad faith] must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement. Just what conduct will meet these criteria must be determined on a case by case basis and will depend on the contractual purposes and reasonably justified expectations of the parties." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [272 Cal.Rptr. 387]

Secondary Sources

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, §§ 13.03[2][a]–[c], 13.06 (Matthew Bender)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2001) General Principles of Contract and Bad Faith Actions, §§ 24.25–24.30, 24.32, pp. 901–908

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 12:822–12:846.6, pp. 12C-7–12C-13

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20–24.21, 24.40 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.140 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.21, 82.50 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

11 California Legal Forms, Ch. 26A, *Title Insurance*, § 26A.17[a] (Matthew Bender)

2400. Breach of Employment Contract—Unspecified Term—"At-Will" Presumption (*Revised*)

An employment relationship may be ended by either the employer or the employee, at any time, for any [lawful] reason, or for no reason at all~~, unless~~. This is called "at-will employment."

An employment relationship is not "at will" if the employee proves that the parties, by words or conduct, agreed that the employee would be discharged only for good cause. ~~This relationship is called "at-will employment."~~

Directions for Use

If the plaintiff has made no claim other than the contract claim, then the word "lawful" may be omitted. If the plaintiff has made a claim for wrongful termination or violation of the Fair Employment and Housing Act, then the word "lawful" should be included in order to avoid confusing the jury.

Sources and Authority

- Labor Code section 2922 provides in pertinent part: "An employment, having no specified term, may be terminated at the will of either party on notice to the other."

- "Labor Code section 2922 has been recognized as creating a presumption. The statute creates a presumption of at-will employment which may be overcome 'by evidence that despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a requirement that termination be based only on "good cause." ' " (*Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1488 [28 Cal.Rptr.2d 248], internal citations omitted.)

- Labor Code section 2750 provides: "The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person."

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "Because the presumption of at-will employment is premised upon public policy considerations, it is one affecting the burden of proof. Therefore, even if no substantial evidence was presented by defendants that plaintiff's employment was at-will, the presumption of Labor Code section 2922 required the issue to be submitted to the jury." (*Alexander v. Nextel Communications, Inc*. (1997) 52 Cal.App.4th 1376, 1381–1382 [61 Cal.Rptr.2d 293], internal citations omitted.)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that … the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)

Secondary Sources

2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 165–166

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.02 (Matthew Bender)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, § 8.13

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.10–11. 249.13, 249.21, 249.43 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Wrongful Termination and Discipline*, Forms 1, 2, 5–6 (Matthew Bender)

FAIR EMPLOYMENT AND HOUSING ACT

2521. Hostile Work Environment Harassment—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j)) (*Revised*)

[*Name of plaintiff***] claims that that [he/she] was subjected to harassment based on [his/her] [***describe protected status—for example, race, gender, or age***], in [his/her] workplace at [***name of defendant***], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/was a person providing services pursuant to a contract with [***name of defendant***]];**

2. **That [***name of plaintiff***] was subjected to unwanted harassing conduct because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [***protected status***];**

3. **That the harassing conduct was so severe, widespread, or persistent that a reasonable [***describe member of protected group***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

4. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

5. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor ~~with actual [*or reasonably perceived***] authority over [***name of plaintiff***]~~ engaged in the conduct;]**

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

6. **That [***name of plaintiff***] was harmed; and**

7. **That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Directions for Use

This instruction is intended for use when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's co-worker, see CACI No. 2522, *Hostile Work Environment Harassment—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j)).*

Element 5 must be modified to select the applicable basis of liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) ratification/respondeat superior.

The issue of whether a supervisor must have actual or apparent authority over the plaintiff in order to trigger vicarious liability for harassing conduct appears to be open. See *Chapman v. Enos* (2004) 116 Cal.App.4th 920 [10 Cal.Rptr.3d 852]. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.*

Under Federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275, 141 L.Ed.2d 662].)

Employers may be liable for the conduct of certain agents (see Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1), and *Reno v. Baird* (1998) 18 Cal.4th 640, 648 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning]).

Sources and Authority

- Government Code section 12940(j) provides that it is an unlawful employment practice for "an employer . . . or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

- Government Code section 12940(j)(4)(A) provides: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

- Government Code section 12940(j)(5) provides that for purposes of claims of harassment under the FEHA, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:
  (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.
  (B) The person is customarily engaged in an independently established business.
  (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

- Government Code section 12940(j)(4)(C) provides, in part: " '[H]arassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions." (Gov. Code, § 12940(j)(4)(C).)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

- Under Federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the

organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275, 141 L.Ed.2d 662].)

- Government Code section 12940(i) provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

- Government Code section 12926(m) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

Secondary Sources

2 Witkin, Summary of California Law (9th ed. 1988) Agency and Employment, § 310, pp. 304–305; id. (2002 supp.) at § 310, pp. 301–302

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, §§ 2.68, 2.75, pp. 56, 60; id., Sexual Harassment, at §§ 3.1, 3.17, 3.36, pp. 116, 125–126, 140–141

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.36 (Matthew Bender)

Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2.51, 2.53, pp. 68–70, 72–75 (rel. 12/93); id. (2001 supp.) at §§ 2.51, 2.53, pp. 61–66, 69–73

FAIR EMPLOYMENT AND HOUSING ACT

2525. Harassment—"Supervisor" Defined (*Revised*)

[*Name of alleged harasser***] was a supervisor for [***name of defendant***] if [he/she] had the discretion and authority:**

[a. To hire, ~~direct,~~ transfer, promote, assign, reward, discipline, [or] discharge [or] [*insert other employment action***] other employees [or effectively to recommend any of these actions];] ~~[or]~~**

[b. To act on the grievances of other employees or effectively to recommend action on grievances~~.~~;] [or]

[c. To direct [*name of plaintiff***]'s daily work activities.]**

Directions for Use

~~This instruction is intended for use only in a quid pro quo sexual harassment case brought under the Fair Employment and Housing Act.~~

If utilizing this instruction, *Chapman v. Enos* (2004) 116 Cal.App.4th 920 [10 Cal.Rptr.3d 852] should be considered."

Sources and Authority

- Government Code section 12940(j) provides that it is an unlawful employment practice for "an employer . . . or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action."

- Government Code section 12926(r) provides: " 'Supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

- "This section has been interpreted to mean that the employer is strictly liable for the harassing actions of its supervisors and agents, but that the employer is only liable for harassment by a coworker if the employer knew or should have known of the conduct and failed to take immediate corrective action. Thus, characterizing the employment status of the

harasser is very significant." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1046 [58 Cal.Rptr.2d 122], internal citations omitted.)

- "The case and statutory authority set forth three clear rules. First, . . . a supervisor who personally engages in sexually harassing conduct is personally liable under the FEHA. Second, . . . if the supervisor participates in the sexual harassment or substantially assists or encourages continued harassment, the supervisor is personally liable under the FEHA as an aider and abettor of the harasser. Third, under the FEHA, the employer is vicariously and strictly liable for sexual harassment by a supervisor." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1327 [58 Cal.Rptr.2d 308].)

- "[W]hile an employer's liability under the [FEHA] for an act of sexual harassment committed by a supervisor or agent is broader than the liability created by the common law principle of respondeat superior, respondeat superior principles are nonetheless relevant in determining liability when, as here, the sexual harassment occurred away from the workplace and not during work hours." (*Doe, supra,* 50 Cal.App.4th at pp. 1048–1049.)

- "The FEHA does not define 'agent.' Therefore, it is appropriate to consider general principles of agency law. An agent is one who represents a principal in dealings with third persons. An agent is a person authorized by the principal to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal. A supervising employee is an agent of the employer." (*Fiol, supra,* 50 Cal.App.4th at p. 1328, internal citations omitted.)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol, supra,* 50 Cal.App.4th at p. 1331.)

- "[W]hile full accountability and responsibility are certainly indicia of supervisory power, they are not required elements of … the FEHA definition of supervisor. Indeed, many supervisors with responsibility to direct others using their independent judgment, and whose supervision of employees is not merely routine or clerical, would not meet these additional criteria though they would otherwise be within the ambit of the FEHA supervisor definition." (*Chapman v. Enos* (2004) 116 Cal.App.4th 920, 930 [10 Cal.Rptr.3d 852], footnote omitted.)

Secondary Sources

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Sexual Harassment, § 3.21, pp. 128–129

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.81 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* §§ 115.20, 115.36, 115.54 (Matthew Bender)

Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2.51, p. 69 (rel. 12/93); id. (2001 supp.) at § 2.51, pp. 62–63

2527. Failure to Prevent Harassment or Discrimination—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(k)) (*New*)

[*Name of plaintiff***] claims that that [***name of defendant***] failed to prevent [harassment/ discrimination] based on [***describe protected status—for example, race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/was a person providing services pursuant to a contract with [***name of defendant***]];**

2. **That [***name of plaintiff***] was subjected to [harassment/discrimination] because [he/ she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [***protected status***];**

3. **That [***name of defendant***] failed to take reasonable steps to prevent the [harassment/ discrimination];**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s failure to take reasonable steps to prevent [harassment/ discrimination] was a substantial factor in causing [***name of plaintiff***]'s harm.**

Sources and Authority

- Government Code section 12940(k) provides that it is an unlawful employment practice for "an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

- "The employer's duty to prevent harassment and discrimination is affirmative and mandatory." (*Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal. App. 4th 1021, 1035 [127 Cal. Rptr. 2d 285].)

- "This section creates a tort that is made actionable by statute. ' " '[T]he word "tort" means a civil wrong, other than a breach of contract, for which the law will provide a remedy in the form of an action for damages.' 'It is well settled the Legislature possesses a broad authority ... to establish ... tort causes of action.' Examples of statutory torts are plentiful in California law." ' Section 12960 et seq. provides procedures for the prevention and elimination of unlawful employment practices. In particular, section 12965, subdivision (a) authorizes the Department of Fair Employment and Housing (DFEH) to bring an accusation of an unlawful employment practice if conciliation efforts are unsuccessful, and section 12965, subdivision (b) creates a private right of action for damages for a complainant whose complaint is not

pursued by the DFEH." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286 [73 Cal. Rptr. 2d 596], internal citations omitted.)

- "With these rules in mind, we examine the section 12940 claim and finding with regard to whether the usual elements of a tort, enforceable by private plaintiffs, have been established: Defendants' legal duty of care toward plaintiffs, breach of duty (a negligent act or omission), legal causation, and damages to the plaintiff." (*Trujillo, supra,* 63 Cal.App.4th at pp. 286–287, internal citation omitted.)

- "Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented. Plaintiffs have not shown this duty was owed to them, under these circumstances. Also, there is a significant question of how there could be legal causation of any damages (either compensatory or punitive) from such a statutory violation, where the only jury finding was the failure to prevent actionable harassment or discrimination, which, however, did not occur." (*Trujillo, supra,* 63 Cal.App.4th at p. 289.)

FAIR EMPLOYMENT AND HOUSING ACT

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements (*Revised*)

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] based on [his/her] [physical/mental] disability. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. [**That [***name of defendant***] [knew/thought] [***name of plaintiff***] had a [physical/mental] [condition/disease/disorder/[***describe health condition***]] that limited [***insert major life activity***];] [or]**

   [That [*name of defendant***] [knew/thought] [***name of plaintiff***] had a history of having a [physical/mental] [condition/disease/disorder/[***describe health condition***]] that limited [***insert major life activity***];]**

4. **That [***name of plaintiff***] was able to perform the essential job duties [with reasonable accommodation for [his/her] condition];**

5. **That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];**

6. **[That [***name of plaintiff***]'s [history of a] [physical/mental] [condition/disease/ disorder/[***describe health condition***]] was a motivating reason for the [discharge/ refusal to hire/[***other adverse employment action***]];] [or]**

   [That [*name of defendant***]'s belief that [***name of plaintiff***] had [a history of] the [physical/mental] [condition/disease/disorder/[***describe health condition***]] was a motivating reason for the [discharge/refusal to hire/***other adverse employment action***];]**

7. **That [***name of plaintiff***] was harmed; and**

8. **That [***name of defendant***]'s [decision/conduct] was a substantial factor in causing [***name of plaintiff***]'s harm.**

Directions for Use

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)-(d).)

Under element 3, select the claimed basis of discrimination: an actual disability, a record of a disability, and/or a perceived disability. If the only claimed basis of discrimination is a perceived disability, then delete element 4.

The FEHA also prohibits medical condition discrimination, but defines "medical condition" narrowly (see Gov. Code, § 12926(h)). This instruction may be modified for use for a medical condition discrimination claim under the FEHA.

Regarding element 4, there appears a divergence in authority on whether the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job. Cases involving discrimination based on disability have stated that the issue is an element of the plaintiff's burden of proof: "The plaintiff can establish a prima facie case by proving that: (1) plaintiff suffers from a disability; (2) plaintiff is a qualified individual; and (3) plaintiff was subjected to an adverse employment action because of the disability." (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236 [66 Cal.Rptr.2d 830], internal citations omitted.) However, in *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 360 [118 Cal.Rptr.2d 443], a case involving an alleged failure to provide a reasonable accommodation, the court observed that FEHA, unlike ADA, does not require a plaintiff to prove he or she is a "qualified individual with a disability." Note that the Supreme Court is reviewing this issue. (See *Green v. State of California* (2005) 132 Cal.App.4th 97 [33 Cal.Rptr.3d 254], review granted Nov. 16, 2005, S137770.)

Where the existence of a qualifying disability is disputed, the court must tailor an instruction to the evidence in the case.

Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the ... physical disability, mental disability, [or] medical condition ... of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- Government Code section 12940(a)(1) also provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability ... where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the

health or safety of others even with reasonable accommodations."

- For a definition of "mental disability," see Government Code section 12926(i).

- For a definition of "physical disability," see Government Code section 12926(k).

- Government Code section 12926.1(c) provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."

- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)

- "An adverse employment decision cannot be made 'because of' a disability when the disability is not known to the employer ... . [A] plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made." (*Brundage*, *supra*, 57 Cal.App.4th at pp. 236-237.)

Secondary Sources

8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 762, pp. 262-263; *id.* (2002 supp.) at §§ 762, 762A, pp. 159-164

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.78, pp. 61-63

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.14, 115.23, 115.34, 115.77[3][a] (Matthew Bender)

Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, §§ 2:45-2:46, pp. 59-61; *id.* (2001 supp.) at § 2:46, pp. 50-52

3103. Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57) (*Revised*)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was neglected by [***name of defendant***] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] had care or custody of [***name of plaintiff/decedent***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] while [he/she] was in [***name of defendant***]'s care or custody;**

3. **That [***name of defendant***] failed to use the degree of care that a reasonable person in the same situation would have used by [***insert one or more of the following:***]**

   [failing to assist in personal hygiene or in the provision of food, clothing, or shelter;]

   [failing to provide medical care for physical and mental health needs;]

   [failing to protect [*name of plaintiff/decedent***] from health and safety hazards;]**

   [failing to prevent malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

4. **That [***name of plaintiff/decedent***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

Directions for Use

This instruction is intended for plaintiffs who are not seeking survival damages for pain and suffering or attorney fees and costs. Plaintiffs who are seeking such damages should use CACI No. 3104, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.57),* or CACI No. 3105, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.57).* The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

This instruction is not intended for cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) (see Welf. & Inst. Code, § 15657.2 and Civ. Code, § 3333.2(c)(2)).

Sources and Authority

- Welfare and Institutions Code section 15610.07 provides:

  "Abuse of an elder or a dependent adult" means either of the following:
  (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
  (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.57 provides:

  (a) "Neglect" means either of the following:
  (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.
  (2) The negligent failure of the person themselves to exercise that degree of care that a reasonable person in a like position would exercise.
  (b) Neglect includes, but is not limited to, all of the following:
  (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.
  (2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.
  (3) Failure to protect from health and safety hazards.
  (4) Failure to prevent malnutrition or dehydration.
  (5) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (4), inclusive, for himself or herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

- "[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)

- Welfare and Institutions Code section 15657.2 provides: "Notwithstanding this article, any cause of action for injury or damage against a health care provider, as defined in Section 340.5 of the Code of Civil Procedure, based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action."

- Civil Code section 3333.2(c)(2) provides: "'Professional negligence' means a negligent act or omission to act by a health care provider in the rendering of professional services, which

act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital."

- Welfare and Institutions Code section 15610.27 provides: "'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15610.23 provides:

  (a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.
  (b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ....' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals-health practitioners as well as care custodians-should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

California Elder Law Litigation (Cont.Ed.Bar 2003–2005) §§ 2.70–2.72

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[3] (Matthew Bender)

3202. "Repair Opportunities" Explained (*Revised*)

Each time the [*consumer good/new motor vehicle***] was given to [***name of defendant***] [or its ~~representative~~ authorized repair facility] for repair counts as an opportunity to repair, even if [it/they] did not do any repair work.**

In determining whether [*name of defendant***] had a reasonable number of opportunities to fix the [***consumer good/new motor vehicle***], you should consider all the circumstances surrounding each repair visit. [***Name of defendant***] [or its authorized repair facility] must have been given at least two opportunities to fix the ~~[~~[***consumer good***~~]~~/~~substantially impairing defect~~** *new motor vehicle*] **[unless only one repair attempt was possible because the [***consumer good/new motor vehicle***] was later destroyed or because [***name of defendant***] [or its authorized repair facility] refused to attempt the repair].**

Directions for Use

This instruction applies only to claims under Civil Code section 1793.2(d), and not to other claims, such as claims for breach of the implied warranty of merchantability. (See *Mocek v. Alfa Leisure, Inc.* (2003) 114 Cal.App.4th 402, 405–406). ~~Use the "substantially impairing defect" option in the last sentence only in cases involving new motor vehicles.~~

The bracketed portion of the last sentence of this instruction ~~may be omitted~~ is intended for use only in cases where the evidence shows that only one repair attempt was possible because of the subsequent malfunction and destruction of the vehicle or where the defendant refused to attempt the repair. (See *Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750 [52 Cal.Rptr.2d 134]; *Gomez v. Volkswagen of America, Inc.* (1985) 169 Cal.App.3d 921 [215 Cal.Rptr. 507].)

Sources and Authority

- Civil Code section 1793.2(d) provides, in part:
  (1) Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer. …
  (2) If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle … to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle … or promptly make restitution to the buyer.

- "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not

responsible." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1103–1104 [109 Cal.Rptr.2d 583], internal citation omitted.)

- "Section 1793.2(d) requires the manufacturer to afford the specified remedies of restitution or replacement if that manufacturer is unable to repair the vehicle 'after a reasonable number of attempts.' 'Attempts' is plural. The statute does not require the manufacturer to make restitution or replace a vehicle if it has had only one opportunity to repair that vehicle." (*Silvio v. Ford Motor Co.* (2003) 109 Cal.App.4th 1205, 1208 [135 Cal.Rptr.2d 846].)

Secondary Sources

2 California UCC Sales & Leases (Cont.Ed.Bar 2002) Prelitigation Remedies, § 17.70

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

3723. Substantial Deviation (*Revised*)

If [an employee/a representative] combines his or her personal business with the employer's business, then the employee's conduct is within the scope of [employment/ authorization].

However, if ~~it clearly appears~~ at the time of the conduct ~~that~~ the [employee/representative] was not performing work for his or her employer, either directly or indirectly, but was acting only for his or her own personal reasons, then the conduct was not within the scope of [employment/authorization].

[An employee's conduct that slightly deviates from an employee's work is to be expected. For example, acts that are necessary for an employee's comfort, health, and convenience while at work are within the scope of employment.]

Directions for Use

This instruction is closely related to CACI No. 3720, *Scope of Employment*. It focuses on when an act is not within the scope of employment.

Sources and Authority

- "[C]ases that have considered recovery against an employer for injuries occurring within the scope and during the period of employment have established a general rule of liability 'with a few exceptions' in instances where the employee has 'substantially deviated from his duties for personal purposes.' " (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 218 [285 Cal.Rptr. 99, 814 P.2d 1341], internal citation omitted.)

- "In some cases, the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment." (*Mary M., supra*, 54 Cal.3d at p. 213, internal citations omitted.)

- "[A]n employer cannot deny responsibility for a tort that occurs when an employee engages in an act necessary to his or her comfort and convenience while at work." (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1563 [56 Cal.Rptr.2d 333].)

- "The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer." (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 139 [176 Cal.Rptr. 287], internal citation omitted.)

- "[D]eviations which do not amount to a turning aside completely from the employer's business, so as to be inconsistent with its pursuit, are often reasonably expected . . . . In order to release an employer from liability, the deviation must be so material or substantial as to amount to an entire departure." (*DeMirjian v. Ideal Heating Corp.* (1954) 129 Cal.App.2d 758, 766 [278 P.2d 114], internal citation omitted.)

- Where the employee combines personal business with that of the employer or attends "to both at substantially the same time, no nice inquiry will be made" into which business the employee was engaged in at the time of injury unless it is readily apparent that the employee could not have been serving the employer, either directly or indirectly. (*Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478, 906 P.2d 440].)

- The fact that the employee is on the same route of return that would be used for both his employer's errand and his own tends to show a combination of missions. (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 496 [48 Cal.Rptr. 765].)

- But if the employee deviates substantially from employment duties for personal purposes, or "if the misconduct is not an 'outgrowth' of the employment," the scope-of-employment test is not met. (*Farmers Insurance Group, supra,* 11 Cal.4th at p. 1005.) Thus, " 'if the tort is personal in nature, the employee's mere presence at the worksite and attendance to job duties prior to or subsequent to the tort, will not call into play the principles of respondeat superior.' " (*Ibid.*, internal citations omitted.)

- " '[A]cts necessary to the comfort, convenience, health and welfare of the employee while at work, though strictly personal to himself and not acts of service, do not take him outside the scope of his employment.' " (*Bailey, supra,* 48 Cal.App.4th at p. 1560, internal citations omitted.)

- "While the question of whether an employee has departed from his special errand is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 933 [237 Cal.Rptr. 718], internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 127–128

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability,* § 8.03[3] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees,* § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts,* § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee* (Matthew Bender)

1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:8

3964. Jurors Not to Consider Attorney Fees and Court Costs (*New*)

You must not consider, or include as part of any award, attorney fees or expenses the parties incurred in bringing or defending this lawsuit.

Directions for Use

This instruction is intended to prevent jurors from improperly factoring attorney fees into their damage awards. Do not use this instruction in cases in which attorney fees are a jury issue.

DAMAGES

3942. Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase) (*Revised*)

You must now decide the amount, if any, that you should award [*name of plaintiff***] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. Whether the conduct caused physical harm;

2. Whether [*name of defendant***] disregarded the health or safety of others;**

3. Whether [*name of plaintiff***] was weak financially;**

4. Whether [*name of defendant***] knew [***name of plaintiff***] was weak financially and took advantage of [him/her/it];**

5. Whether [*name of defendant***]'s conduct involved a pattern or practice; or**

6. Whether [*name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm that [***name of defendant***] knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

Directions for Use

Read the bracketed language in subdivision (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Company, Inc.* (2005) 35 Cal. 4th 1159 [29 Cal.Rptr.3d 379].) The bracketed phrase concerning "potential harm" might be appropriate, for example, where damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages], or where the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted (*Simon*, *supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses]. The bracketed phrase should not be given where an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendants' wrongful acts. *Simon*, *supra*, 35 Cal.4th at pp. 1178–1179 (rejecting consideration for punitive damages purposes of the plaintiff's loss of the benefit of the bargain where the jury had found that there was no binding contract).

Read the bracketed language in subdivision (c) only if the defendant has presented relevant evidence regarding this issue.

"A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 422 [123 S.Ct. 1513, 155 L.Ed.2d 585].) An instruction on this point should be included within this instruction if appropriate to the facts.

~~In June 2003, the United States Supreme Court restated the due process principles limiting awards of punitive damages in *State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 418. Several subsequent California Court of Appeal cases have responded to various aspects of the United States Supreme Court's reasoning. (See, e.g., *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 [6 Cal.Rptr.3d 793] [in light of *Campbell*, it is error to give BAJI 14.71].)~~

~~The California Supreme Court recently granted review in three appellate decisions that involve post-Campbell punitive damages awards. (*Henley v. Philip Morris, Inc.* (2004) 114 Cal.App.4th 1429 [9 Cal.Rptr.3d 29], review granted Apr. 28, 2004, S123023; *Simon v. San Paolo U.S. Holding Co.* (2003) 113 Cal.App.4th 1137 [7 Cal.Rptr.3d 367], review granted Mar. 24, 2004, S121933; *Johnson v. Ford Motor Co.*, review granted Mar. 24, 2004, S121723.) At this time, because of the recent and rapidly developing state of California law, the Advisory Committee has elected not to make substantive modifications to the CACI instructions on punitive damages in response to these holdings. Because state and federal law in this area is evolving, the court should assess whether changes to the instruction are appropriate based on any recent decisions.~~

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter.

The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

Sources and Authority

- Civil Code section 3294 provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the

defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually

suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "We conclude that the rule . . . that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ["reasonable relation"] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1327, pp. 784–786, 1369–1381, pp. 836–852

4 Levy et al., California Torts, Ch. 54, Punitive *Damages,* §§ 54.20–54.25, 54.24[4][d] (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.1– 14.8, 14.23

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

4200. "Fiduciary Duty" Explained (*New*)

[A/An] [agent/stock broker/real estate agent/real estate broker/corporate officer/partner/ [*insert other fiduciary relationship***]] owes what is known as a fiduciary duty to [his/her/its] [principal/client/corporation/partner[***insert other fiduciary relationship***]]. A fiduciary duty imposes on [a/an] [agent/stock broker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]] a duty to act with the utmost good faith in the best interests of [his/her/its] [principal/client/corporation/partner[***insert other fiduciary relationship***]].**

Sources and Authority

- "A fiduciary relationship is ' " 'any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. …' " ' " (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 [130 Cal. Rptr. 2d 860], internal citations omitted.)

BREACH OF FIDUCIARY DUTY

4201. Failure to Use Reasonable Care—Essential Factual Elements (*New*)

[*Name of plaintiff***] claims that [he/she/it] was harmed by [***name of defendant***]'s breach of the fiduciary duty to use reasonable care. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [agent/stock broker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]];**

2. **That [***name of defendant***] acted on [***name of plaintiff***]'s behalf for purposes of [***insert description of transaction, e.g., "purchasing a residential property"***];**

3. **That [***name of defendant***] failed to act as a reasonably careful [agent/stock broker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]] would have acted under the same or similar circumstances;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Directions for Use

The instructions in this series are intended for suits brought by or on behalf of the principal. They also assume that the plaintiff is bringing a legal cause of action, not an action in equity. (See *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819 [251 Cal.Rptr. 530].)

In appropriate cases, element 3 may be tailored to reflect the particular fiduciary duty at issue.

For a breach of fiduciary duty instruction in cases involving attorney defendants, see CACI No. 605, *Breach of Fiduciary Duty—Essential Factual Elements*.

While the advisory committee has not included "employee" as an option to identify the defendant agent in element 1, there may be cases in which certain employees qualify as "agents" subjecting them to liability for breach of fiduciary duty.

Sources and Authority

- "A fiduciary relationship is ' " 'any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if

he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. …' " ' " (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 [130 Cal. Rptr. 2d 860], internal citations omitted.)

- "An act such as breach of fiduciary duty may be both a breach of contract and a tort." (*Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1178 [27 Cal.Rptr.3d 754], internal citation omitted.)

- "Breach of a real estate agent's fiduciary duty to his or her client may constitute negligence or fraud, depending on the circumstances of the case." (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 563 [29 Cal.Rptr.2d 463].)

- "Breach of fiduciary duty is a tort that by definition may be committed by only a limited class of persons." (*1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 592 [132 Cal.Rptr.2d 789].)

- "Traditional examples of fiduciary relationships in the commercial context include trustee/beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, and agent/principal." (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 30 [130 Cal. Rptr. 2d 860], internal citations omitted.)

- " 'The relationship between a broker and principal is fiduciary in nature and imposes on the broker the duty of acting in the highest good faith toward the principal.' " (*Twomey v. Mitchum, Jones & Templeton, Inc.* (1968) 262 Cal.App.2d 690, 709 [69 Cal.Rptr. 222], internal citations omitted.)

- "A stockbroker's fiduciary duty requires more than merely carrying out the stated objectives of the customer; at least where there is evidence, as there certainly was here, that the stockbroker's recommendations were invariably followed, the stockbroker must 'determine the customer's actual financial situation and needs.' If it would be improper and unsuitable to carry out the speculative objectives expressed by the customer, there is a further obligation on the part of the stockbroker 'to make this known to [the customer], and [to] refrain from acting except upon [the customer's] express orders.' Under such circumstances, although the stockbroker can advise the customer about the speculative options available, he or she should not solicit the customer's purchase of any such speculative securities that would be beyond the customer's 'risk threshold.' " (*Duffy v. Cavalier* (1989) 215 Cal.App.3d 1517, 1538 [264 Cal.Rptr. 740], internal citations omitted.)

- "Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency. … 'The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made, except to the extent that fraud, duress, illegality, or the incapacity of one or both of the parties to the agreement modifies it or deprives it of legal effect.' " (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 755 [17 Cal. Rptr. 2d 734], internal citations omitted.)

- "In order to plead a cause of action for breach of fiduciary duty against a trustee, the plaintiff must show the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach; the absence of any one of these elements is fatal to the cause of action. The beneficiary of the trust has the initial burden of proving the existence of a fiduciary duty and the trustee's failure to perform it; the burden then shifts to the trustee to justify its actions." (*LaMonte v. Sanwa Bank California* (1996) 45 Cal.App.4th 509, 517 [52 Cal.Rptr.2d 861], internal citations omitted.)

- "Recovery for damages based upon breach of fiduciary duty is controlled by Civil Code section 3333, the traditional tort recovery. This is actually broader in some instances than damages which may be recovered for fraud. Also, punitive damages are appropriate for a breach of fiduciary duty." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1582 [36 Cal.Rptr.2d 343], internal citations omitted.)

- "While breach of fiduciary duty is a question of fact, the existence of legal duty in the first instance and its scope are questions of law." (*Kirschner Brothers Oil, Inc. v. Natomas Co.* (1986) 185 Cal.App.3d 784, 790 [229 Cal.Rptr. 899], internal citation omitted.)

- "[I]n actions against fiduciaries, a plaintiff may have the option of pursuing either legal or equitable remedies." (*Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 863 [251 Cal.Rptr. 530].)

- "A minority shareholder's action for damages for the breach of fiduciary duties of the majority shareholder is one in equity, with no right to a jury trial. [Citations]" (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 122 [84 Cal.Rptr.2d 753]

Secondary Sources

2 Miller and Starr California Real Estate (3rd ed.) § 3:26

2 Witkin, Summary of California Law (1987 9th ed.) Agency and Employment, § 41

4202. Duty of Undivided Loyalty—Essential Factual Elements (*New*)

[*Name of plaintiff***] claims that [he/she/it] was harmed by [***name of defendant***]'s breach of the fiduciary duty of loyalty. [A/An] [agent/stock broker/real estate agent/real estate broker/ corporate officer/partner/[***insert other fiduciary relationship***]] owes [his/her/its] [principal/client/corporation/partner[***insert other fiduciary relationship***]] undivided loyalty. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [agent/stock broker/real estate agent/real estate broker/corporate officer/partner[***insert other fiduciary relationship***]];**

2. **That [***name of defendant***] [***insert one of the following:***]**

   [acted against [*name of plaintiff***]'s interests;]**

   [acted on behalf of a party whose interests were adverse to [*name of plaintiff***];]**

3. **That [***name of plaintiff***] did not give informed consent to [***name of defendant***]'s conduct;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Directions for Use

The instructions in this series are intended for suits brought by or on behalf of the principle. They also assume that the plaintiff is bringing a legal cause of action, not an action in equity. (See *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819 [251 Cal.Rptr. 530].)

For a breach of fiduciary duty instruction in cases involving attorney defendants, see CACI No. 605, *Breach of Fiduciary Duty—Essential Factual Elements.*

While the advisory committee has not included "employee" as an option to identify the defendant agent in element 1, there may be cases in which certain employees qualify as "agents" subjecting them to liability for breach of fiduciary duty.

Sources and Authority

- Rest.2d Agency, section 387 states: "Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."

- Rest.2d Agency, section 391 states: "Unless otherwise agreed, an agent is subject to a duty to his principal not to act on behalf of an adverse party in a transaction connected with his agency without the principal's knowledge."

- Rest.2d Agency, section 393 states: "Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency."

- Rest.2d Agency, section 394 states: "Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters which the agent is employed."

- Rest.2d Agency, section 396 extends the duty even after the agency's termination "unless otherwise agreed."

- "Every agent owes his principal the duty of undivided loyalty. During the course of his agency, he may not undertake or participate in activities adverse to the interests of his principal. In the absence of an agreement to the contrary, an agent is free to engage in competition with his principal after termination of his employment but he may plan and develop his competitive enterprise during the course of his agency only where the particular activity engaged in is not against the best interests of his principal." (*Sequoia Vacuum Systems v. Stransky* (1964) 229 Cal.App.2d 281, 287 [40 Cal.Rptr. 203].)

- "The determination of the particular factual circumstances and the application of the ethical standards of fairness and good faith required of a fiduciary in a given situation are for the trier of facts" (*Sequoia Vacuum Systems, supra,* 229 Cal.App.2d at p. 288, internal citation omitted.)

- "[T]he protection of the principal's interest requires a full disclosure of acts undertaken in preparation of entering into competition." (*Sequoia Vacuum Systems, supra,* 229 Cal.App.2d at p. 287, internal citation omitted.)

- "It is settled that a director or officer of a corporation may not enter into a competing enterprise which cripples or injures the business of the corporation of which he is an officer or director. An officer or director may not seize for himself, to the detriment of his company, business opportunities in the company's line of activities which his company has an interest and prior claim to obtain. In the event that he does seize such opportunities in violation of his fiduciary duty, the corporation may claim for itself all benefits so obtained." (*Xum Speegle, Inc. v. Fields* (1963) 216 Cal.App.2d 546, 554 [31 Cal. Rptr. 104], internal citations omitted.)

- "Inherent in each of these relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the fiduciary obligations far more stringent than those required of ordinary contractors. As Justice Cardozo observed, 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior.' " (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 30 [130 Cal. Rptr. 2d 860], internal citation omitted.)

Secondary Sources

2 Witkin, Summary of California Law (1987 9th ed.) Agency and Employment, §§ 43–56

4203. Duty of Confidentiality—Essential Factual Elements (*New*)

[*Name of plaintiff***] claims that [he/she/it] was harmed by [***name of defendant***]'s breach of the fiduciary duty of confidentiality. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [agent/stock broker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]];**

2. **That [***name of defendant***] had information relating to [***name of plaintiff***] that [he/she/it] knew or should have known was confidential;**

3. **That [***name of defendant***] [***insert one of the following:***]**

   [used [*name of plaintiff***]'s confidential information for [his/her/its] own benefit;]**

   [communicated [*name of plaintiff***]'s confidential information to third parties;]**

4. **That [***name of plaintiff***] did not give informed consent to [***name of defendant***]'s conduct;**

5. **That the confidential information was not a matter of general knowledge;**

6. **That [***name of plaintiff***] was harmed; and**

7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Directions for Use

The instructions in this series are intended for suits brought by or on behalf of the principle. They also assume that the plaintiff is bringing a legal cause of action, not an action in equity. (See *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819 [251 Cal.Rptr. 530].)

For a breach of fiduciary duty instruction in cases involving attorney defendants, see CACI No. 605, *Breach of Fiduciary Duty—Essential Factual Elements.*

While the advisory committee has not included "employee" as an option to identify the defendant agent in element 1, there may be cases in which certain employees qualify as "agents" subjecting them to liability for breach of fiduciary duty.

A cause of action relating to the misuse of confidential information may also be brought, in certain circumstances, against non-fiduciaries. This instruction may be modified to apply to such cases.

Sources and Authority

- Rest.2d Agency 395: "Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge."

- " 'The law of confidential relationships governs duties of trust that one is not obligated to assume. Once a person commits himself to a confidential relationship, the law requires him to fulfill the duties attendant to the relationship. Confidential relations protect the trust that is implicit in relationships between employers and employees, between masters and servants, and between principals and agents, rather than the information that may pass between these parties.' " (*Balboa Ins. Co. v. Trans Global Equities* (1990) 218 Cal.App.3d 1327, 1350–1351 [267 Cal.Rptr. 787], italics in original, internal citation omitted.)

4204. Duties of Escrow Holder (*New*)

Escrow holders have a fiduciary duty to the parties in escrow:

1. **To obtain reliable evidence that a real estate broker was regularly licensed before paying [his/her/its] commission;**

2. **To comply strictly with the parties' written instructions; [and]**

3. **To exercise reasonable skill and diligence in carrying out the escrow instructions; [and]**

4. **[***Insert other applicable duty***].**

Sources and Authority

- "The duty of an escrow holder to obtain evidence that a real estate broker was regularly licensed before delivering compensation arises from Business and Professions Code section 10138. Respondent assumed this duty only by entering the contract to execute the escrow for appellant and the seller. Accordingly, the duty arose out of and is not outside the contract." (*Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, [27 Cal.Rptr.3d 754], internal citation omitted.)

- "The duty to communicate any facts learned about the broker's licenses arises only because of the duty to obtain such evidence. Since the duty to obtain such evidence is not outside the contract, the duty to communicate those findings also is not outside the contract." (*Kangarlou, supra,* 128 Cal.App.4th at p , internal citation omitted.)

- "An escrow holder has a fiduciary duty to the escrow parties to comply strictly with the parties' instructions. The holder only assumes this duty by agreeing to execute the escrow. The obligation to exercise reasonable skill and diligence in carrying out the escrow instructions, and to comply strictly with the depositor's written instructions are within the duties undertaken in the contract." (*Kangarlou, supra,* 128 Cal.App.4th at p. , internal citation omitted.)

BREACH OF FIDUCIARY DUTY

4205. Duties of Stockbroker—Speculative Securities (*New*)

Stockbrokers who trade in speculative securities and advise clients have a fiduciary duty to those clients:

1. **To make sure that the client understands the investment risks in light of his or her financial situation;**

2. **To inform the client that speculative investments are not suitable if the stockbroker believes that the client is unable to bear the financial risks involved; and**

3. **Not to solicit the client's purchase of speculative securities that the stockbroker considers to be beyond the client's risk threshold.**

If these duties are met and the client still insists on purchasing speculative securities, the stockbroker may advise the client about various speculative securities and purchase speculative securities that the client selects.

Directions for Use

This should be read after CACI No. 4201, *Failure to Use Reasonable Care—Essential Factual Elements.*

Sources and Authority

- "[T]he stockbroker has a fiduciary duty (1) to ascertain that the investor understands the investment risks in the light of his or her actual financial situation; (2) to inform the customer that no speculative investments are suitable if the customer persists in wanting to engage in such speculative transactions without the stockbroker's being persuaded that the customer is able to bear the financial risks involved; and (3) to refrain completely from soliciting the customer's purchase of any speculative securities which the stockbroker considers to be beyond the customer's risk threshold. As long as these duties are met, if the customer nevertheless insists on purchasing speculative securities, the stockbroker is not barred from advising the customer about various speculative securities and purchasing for the customer those securities which the customer selects." (*Duffy v. Cavalier* (1989) 215 Cal.App.3d 1517, 1532 [264 Cal.Rptr. 740], internal citations and footnote omitted.)

- "[T]he relationship between any stockbroker and his or her customer is fiduciary in nature, imposing on the former the duty to act in the highest good faith toward the customer." (*Duffy, supra,* 215 Cal.App.3d at p. 1534, internal citations omitted.)

- "A stockbroker's fiduciary duty requires more than merely carrying out the stated objectives of the customer; at least where there is evidence, as there certainly was here, that the

stockbroker's recommendations were invariably followed, the stockbroker must 'determine the customer's actual financial situation and needs.' If it would be improper and unsuitable to carry out the speculative objectives expressed by the customer, there is a further obligation on the part of the stockbroker 'to make this known to [the customer], and [to] refrain from acting except upon [the customer's] express orders.' Under such circumstances, although the stockbroker can advise the customer about the speculative options available, he or she should not solicit the customer's purchase of any such speculative securities that would be beyond the customer's 'risk threshold.'" (*Duffy, supra,* 215 Cal.App.3d at p. 1538, internal citations omitted.)

4210. Affirmative Defense—Statute of Limitations (*New*)

[*Name defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. [***Name of plaintiff***]'s lawsuit was filed too late if [***name of defendant***] proves that [***name of plaintiff***]'s claimed [injury/harm] occurred before [***insert relevant date***].**

If [*name plaintiff***] proves that before [***insert relevant date***] [he/she/it] was not aware of the wrongful conduct and injury, and was not aware of facts that would have caused a reasonable person to suspect wrongful conduct and injury, then the lawsuit was filed on time.**

Directions for Use

This instruction does not apply to attorneys when acting in their capacity as attorneys. See CACI Nos. 610, *Statute of Limitations Affirmative Defense—Attorney Malpractice—One-Year Limit (Civ Code, § 340.6)*, and 611, *Statute of Limitations Affirmative Defense—Attorney Malpractice—Four-Year Limit (Civ Code, § 340.6).*

Sources and Authority

- "The statute of limitations for breach of fiduciary duty is four years." (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230 [282 Cal.Rptr. 43], internal citation omitted.)

- "A breach of fiduciary duty claim is based on concealment of facts, and the statute begins to run when plaintiffs discovered, or in the exercise of reasonable diligence could have discovered, that facts had been concealed." (*Stalberg, supra,* 230 Cal.App.3d at p. 1230, internal citation omitted.)

- "Where a fiduciary relationship exists, facts which ordinarily require investigation may not incite suspicion and do not give rise to a duty of inquiry. Where there is a fiduciary relationship, the usual duty of diligence to discover facts does not exist." (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 202 [210 Cal.Rptr. 387], internal citations omitted.)

- "[A] plaintiff need not establish that she exercised due diligence to discover the facts within the limitations period unless she is under a duty to inquire and the circumstances are such that failure to inquire would be negligent. Where the plaintiff is not under such duty to inquire, the limitations period does not begin to run until she actually discovers the facts constituting the cause of action, even though the means for obtaining the information are available." (*Hobbs, supra,* 164 Cal.App.3d at p. 202, internal citations omitted.)

- "The distinction between the rules excusing a late discovery of fraud and those allowing late discovery in cases in the confidential relationship category is that in the latter situation, the duty to investigate may arise later because the plaintiff is entitled to rely upon the assumption that his fiduciary is acting on his behalf. However, once a plaintiff becomes aware of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with knowledge of the facts which would have been discovered by such an investigation." (*Hobbs, supra*, 164 Cal.App.3d at p. 202, internal citations omitted.)

- " '[R]esolution of the statute of limitations issue is normally a question of fact … .' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

UNIFORM FRAUDULENT TRANSFER ACT

4300. Actual Intent to Defraud a Creditor (Civ. Code, § 3439.04(a)(1)) Essential Factual Elements (*New*)

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] fraudulently [transferred property/incurred an obligation] to [***name of defendant***] in order to avoid paying a debt to [***name of plaintiff***]. [This is called "actual fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**

2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**

3. **That [***name of debtor***] [transferred the property/incurred the obligation] with the intent to hinder, delay, or defraud any of [his/her/its] creditors;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of debtor***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

To prove intent to hinder, delay, or defraud creditors, it is not necessary to show that [*name of debtor***] had a desire to harm [his/her/its] creditors. [***Name of plaintiff***] need only show that [***name of debtor***] intended to remove or conceal assets to make it more difficult for [his/her/its] creditors to collect payment.**

[It does not matter whether [*name of plaintiff***]'s right to payment arose before or after [***name of debtor***] [transferred property/incurred an obligation].]**

Directions for Use

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence in cases in which the plaintiff is asserting causes of action for both actual and constructive fraud. Read the last bracketed sentence in cases in which the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

If the case concerns a fraudulently incurred obligation, users may wish to insert a brief description of the obligation in this instruction, e.g. "a lien on the property."

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum or money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 758 [21 Cal.Rptr.3d 523], internal citation omitted.) If the only

remedy sought is the return of a particular non-monetary asset, the action is an equitable action. However, even where a specific non-monetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g. "the person for whose benefit the transfer was made" (Civ. Code, § 3439.08(b)(1)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Note that there may be a split of authority regarding the appropriate standard of proof of fraudulent intent. The Sixth District Court of Appeal has stated: "Actual intent to defraud must be shown by clear and convincing evidence. (*Hansford v. Lassar* (1975) 53 Cal.App.3d 364, 377 [125 Cal.Rptr. 804].)" (*Reddy v. Gonzalez* (1992) 8 Cal. App. 4th 118, 123.) Note that the case relied on by the *Hansford* court (*Aggregates Assoc., Inc. v. Packwood* (1962) 58 Cal.2d 580 [25 Cal.Rptr. 545, 375 P.2d 425]) was disapproved by the Supreme Court in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291–292 [137 Cal.Rptr. 635, 562 P.2d 316]. The Fourth District Court of Appeal, Division Two, disagreed with *Reddy*: "In determining whether transfers occurred with fraudulent intent, we apply the preponderance of the evidence test, even though we recognize that some courts believe that the test requires clear and convincing evidence." (*Gagan v. Gouyd* (1999)73 Cal. App. 4th 835, 839 [86 Cal.Rptr.2d 733], internal citations omitted, disapproved on other grounds in *Mejia v. Reed* (2003) 31 Cal.4th 657, 669, fn. 2 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

Sources and Authority

- Civil Code section 3439.04 provides:
  (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:
    (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.
    (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:
      (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
      (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.
  (b) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following:
    (1) Whether the transfer or obligation was to an insider.
    (2) Whether the debtor retained possession or control of the property transferred after the transfer.
    (3) Whether the transfer or obligation was disclosed or concealed.
    (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
    (5) Whether the transfer was of substantially all the debtor's assets.
    (6) Whether the debtor absconded.
    (7) Whether the debtor removed or concealed assets.

(8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
(9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
(11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

(c) The amendment to this section made during the 2004 portion of the 2003-04 Regular Session of the Legislature, set forth in subdivision (b), does not constitute a change in, but is declaratory of, existing law, and is not intended to affect any judicial decisions that have interpreted this chapter.

- Civil Code section 3439.01(b) provides: " 'Claim' means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

- Civil Code section 3439.07 provides, in part:
(a) In an action for relief against a transfer or obligation ... a creditor ... may obtain:
(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.
(2) An attachment or other provisional remedy against the asset transferred or its proceeds ... .
(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure, the following:
(A) An injunction against further disposition by the debtor ... of the asset transferred or its proceeds.
(B) Appointment of a receiver ... .
(C) Any other relief the circumstances may require.
(b) If a creditor has commenced an action on a claim against the debtor, the creditor may attach the asset transferred or its proceeds ... .
(c) If a creditor has obtained a judgment on a claim against the debtor, the creditor may levy execution on the asset transferred or its proceeds.

- "The UFTA permits defrauded creditors to reach property in the hands of a transferee." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

- "A fraudulent conveyance under the UFTA involves 'a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.' 'A transfer made ... by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made, if the debtor made the transfer as follows: [P] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.' " (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829 [28 Cal.Rptr.3d 884], internal citations omitted.)

- "[A] a conveyance will not be considered fraudulent if the debtor merely transfers property which is otherwise exempt from liability for debts. That is, because the theory of the law is that it is fraudulent for a judgment debtor to divest himself of assets against which the creditor could execute, if execution by the creditor would be barred while the property is in the possession of the debtor, then the debtor's conveyance of that exempt property to a third person is not fraudulent." (*Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13 [33 Cal.Rptr.2d 283].)

- "A transfer is not voidable against a person 'who took in good faith and for a reasonably equivalent value or against any subsequent transferee.' " (*Filip, supra,* 129 Cal.App.4th at p. 830, internal citations omitted.)

- " '[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked'; they 'may also be attacked by, as it were, a common law action' " (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 758 [21 Cal.Rptr.3d 523], internal citation omitted.)

- "[E]ven if the Legislature intended that all fraudulent conveyance claims be brought under the UFTA, the Legislature could not thereby dispense with a right to jury trial that existed at common law when the California Constitution was adopted." (*Wisden, supra,* (2004) 124 Cal.App.4th at p. 758, internal citation omitted.)

- "Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer." (*Filip, supra,* 129 Cal.App.4th at p. 834, internal citations omitted.)

- "In order to constitute intent to defraud, it is not necessary that the transferor act maliciously with the desire of causing harm to one or more creditors." (*Economy Refining & Service Co. v. Royal Nat'l Bank* (1971) 20 Cal.App.3d 434, 441 [97 Cal.Rptr. 706].)

- "There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other." (*Filip, supra,* 129 Cal.App.4th at p. 834.)

- "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

4301. Factors to Consider in Determining Actual Intent to Defraud (Civ. Code, § 3439.04(b) (*New*)

In determining whether [*name of debtor***] intended to hinder, delay, or defraud any creditors by [transferring property/incurring an obligation] to [***name of defendant***], you may consider, among other factors, the following:**

[(a) Whether the [transfer/obligation] was to [a/an] [*insert relevant description of insider, e.g., "relative," "business partner," etc.***];]**

[(b) Whether [*name of debtor***] retained possession or control of the property after it was transferred;]**

[(c) Whether the [transfer/obligation] was disclosed or concealed;]

[(d) Whether before the [transfer was made/obligation was incurred], [*name of debtort***] had been sued or threatened with suit;]**

[(e) Whether the transfer was of substantially all [*name of debtor***]'s assets;]**

[(f) Whether [*name of debtor***] fled;]**

[(g) Whether [*name of debtor***] removed or concealed assets;]**

[(h) Whether the value received by [*name of debtor***] was not reasonably equivalent to the value of the [asset transferred/amount of the obligation incurred];]**

[(i) Whether [*name of debtor***] was insolvent or became insolvent shortly after the [transfer was made/obligation was incurred];]**

[(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;]

[(k) Whether [*name of debtor***] transferred the essential assets of the business to a lienholder who transferred the assets to an insider of [***name of defendant***];] [and]**

[(l) [*insert other appropriate factor.***]**

Evidence of one or more factors does not automatically require a finding that [*name of defendant***] acted with the intent to hinder, delay, or defraud creditors. The presence of one or more of these factors is evidence that may suggest the intent to delay, hinder, or defraud.**

Directions for Use

Some or all of the stated factors may not be necessary in every case. Other factors may be added as appropriate depending on the facts of the case.

Sources and Authority

- Civil Code section 3439.04(b) provides:
  ***
  (b) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following:
  (1) Whether the transfer or obligation was to an insider.
  (2) Whether the debtor retained possession or control of the property transferred after the transfer.
  (3) Whether the transfer or obligation was disclosed or concealed.
  (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
  (5) Whether the transfer was of substantially all the debtor's assets.
  (6) Whether the debtor absconded.
  (7) Whether the debtor removed or concealed assets.
  (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
  (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
  (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
  (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.
  ***

- "Over the years, courts have considered a number of factors, the 'badges of fraud' described in a Legislative Committee comment to section 3439.04, in determining actual intent. Effective January 1, 2005, those factors are now codified as section 3439.04, subdivision (b) and include considerations such as whether the transfer was made to an insider, whether the transferee retained possession or control after the property was transferred, whether the transfer was disclosed, whether the debtor had been sued or threatened with suit before the transfer was made, whether the value received by the debtor was reasonably equivalent to the value of the transferred asset, and similar concerns. According to section 3439.04, subdivision (c), this amendment 'does not constitute a change in, but is declaratory of, existing law.' " (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 834 [28 Cal.Rptr.3d 884], internal citations omitted.)

- "[The factors in Civil Code section 3439.04(b)] do not create a mathematical formula to establish actual intent. There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to

provide guidance to the trial court, not compel a finding one way or the other." (*Filip, supra,* 129 Cal.App.4th at p. 834.)

- "Even the existence of several 'badges of fraud' may be insufficient to raise a triable issue of material fact." (*Annod Corporation, v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924], internal citation omitted.)

- "Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer." (*Filip, supra,* 129 Cal.App.4th at p. 834, internal citation omitted.)

4302. Constructive Fraudulent Transfer (Civ. Code, § 3439.04(a)(2))—Essential Factual Elements (*New*)

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***] and, as a result, was unable to pay [***name of plaintiff***] money that was owed. [This is called "constructive fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**

2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**

3. **That [***name of debtor***] did not receive a reasonably equivalent value in exchange for the [transfer/obligation];**

4. **[That [***name of debtor***] was in business or about to start a business or enter a transaction when [his/her/its] remaining assets were unreasonably small for the business or transaction;] [or]**

   [That [*name of debtor***] intended to incur debts beyond [his/her/its] ability to pay as they became due;] [or]**

   [That [*name of debtor***] believed or reasonably should have believed that [he/she/it] would incur debts beyond [his/her/its] ability to pay as they became due;]**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of debtor***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

If you decide that [*name of plaintiff***] has proved all of the above, [he/she/it] does not have to prove that [***name of debtor***] intended to defraud any creditors.**

[It does not matter whether [*name of plaintiff***]'s right to payment arose before or after [***name of debtor***] [transferred property/incurred an obligation].]**

Directions for Use

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence in cases in which the plaintiff is asserting causes of action for both actual and

constructive fraud. Read the last bracketed sentence in cases where the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum or money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 758 [21 Cal.Rptr.3d 523], internal citation omitted.) If the only remedy sought is the return of a particular non-monetary asset, the action is an equitable action. However, even where a specific non-monetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g. "the person for whose benefit the transfer was made" (Civ. Code, § 3439.08(b)(1)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Sources and Authority

- Civil Code section 3439.04(a)(2) provides: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

  Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:
  (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
  (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

- Civil Code section 3439.03 provides: "Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person."

- "There are two forms of constructive fraud under the UFTA. Civil Code section 3439.04, … provides that a transfer is fraudulent if the debtor did not receive reasonably equivalent consideration and either '(1) Was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.' Civil Code section 3439.05 provides that a transfer is fraudulent as to an existing creditor if the debtor does not receive reasonably equivalent value and 'was insolvent at that time or ... became insolvent as a result of the transfer ... .'" (*Mejia v. Reed* (2003) 31 Cal. 4th 657, 669–670 [3 Cal.Rptr.3d 390].)

- "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud

is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

4303. Constructive Fraudulent Transfer (Insolvency) (Civ. Code, § 3439.05)—Essential Factual Elements (*New*)

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***] and was unable to pay [***name of plaintiff***] money that was owed. [This is called "constructive fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**

2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**

3. **That [***name of debtor***] did not receive a reasonably equivalent value in exchange for the [transfer/obligation];**

4. **That [***name of plaintiff***]'s right to payment from [***name of debtor***] arose before [he/she/it] [transferred property/incurred an obligation];**

5. **That [***name of debtor***] was insolvent at that time or became insolvent as a result of the transfer or obligation;**

6. **That [***name of plaintiff***] was harmed; and**

7. **That [***name of debtor***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

If you decide that [*name of plaintiff***] has proved all of the above, [he/she/it] does not have to prove that [***name of debtor***] intended to defraud creditors.**

Directions for Use

This instruction assumes the defendant is a transferee of the debtor. This instruction may be used along with CACI No. 4302, *Constructive Fraud (Civ. Code, § 3439.04(a)(2))—Essential Factual Elements*, in cases where it is alleged that the plaintiff became a creditor before the transfer was made or the obligation was incurred. Read the bracketed second sentence in cases in which the plaintiff is asserting causes of action for both actual and constructive fraud.

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum or money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 758 [21 Cal.Rptr.3d 523], internal citation omitted.) If the only remedy sought is the return of a particular non-monetary asset, the action is an equitable action.

However, even where a specific non-monetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g. "the person for whose benefit the transfer was made" (Civ. Code, § 3439.08(b)(1)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Sources and Authority

Civil Code section 3439.05 provides: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor because insolvent as a result of the transfer or obligation."

Civil Code section 3439.03 provides: "Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person."

"There are two forms of constructive fraud under the UFTA. Civil Code section 3439.04, … provides that a transfer is fraudulent if the debtor did not receive reasonably equivalent consideration and either '(1) Was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.' Civil Code section 3439.05 provides that a transfer is fraudulent as to an existing creditor if the debtor does not receive reasonably equivalent value and 'was insolvent at that time or ... became insolvent as a result of the transfer ... .'" (*Mejia v. Reed* (2003) 31 Cal.4th 657, 669–670 [3 Cal.Rptr.3d 390].)

"A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

4304. "Transfer" Explained (*New*)

"Transfer" means every method of parting with a debtor's property or an interest in a debtor's property.

[*Read one of the following options:***]**

[A transfer may be direct or indirect, absolute or conditional, voluntary or involuntary. A transfer includes [payment of money/release/lease/the creation of a lien or other encumbrance].]

[In this case, [*describe transaction***] is a transfer.]**

Directions for Use

Include the bracketed terms at the end of the third sentence that are at issue in the case only. Read the second bracketed sentence if the transaction has been stipulated to or determined as a matter of law. Otherwise, read the first bracketed option.

Sources and Authority

- Civil Code section 3439.01(i) provides: " 'Transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance."

- Civil Code section 3439.08(e) provides:
  A transfer is not voidable under paragraph (2) of subdivision (a) of Section 3439.04 or Section 3439.05 if the transfer results from the following:
  (1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law.
  (2) Enforcement of a lien in a noncollusive manner and in compliance with applicable law, including Division 9 (commencing with Section 9101) of the Commercial Code, other than a retention of collateral under Sections 9620 and 9621 of the Commercial Code and other than a voluntary transfer of the collateral by the debtor to the lienor in satisfaction of all or part of the secured obligation.

- "On its face, the UFTA applies to all transfers. Civil Code, section § 3439.01, subdivision (i) defines '[t]ransfer' as 'every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset ... .' The UFTA excepts only certain transfers resulting from lease terminations or lien enforcement." (*Meija v. Reed* (2003) 31 Cal.4th 657, 664 [93 Cal.Rptr.3d 390, 74 P.3d 166], internal citations omitted.)

4305. Insolvency Explained (*New*)

[[*Name of debtor***] was insolvent [at the time/as a result] of the transaction if, at fair valuations, the total amount of [his/her/its] debts was greater than the total amount of [his/her/its] assets.]**

In determining [*name of debtor***]'s assets, do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors.**

Directions for Use

If the debtor is a partnership, refer to Civil Code section 3439.02(b). If there are issues regarding specific assets, see Civil Code sections 3439.02(e) and 3439.01(a).

Sources and Authority

- Civil Code section 3439.02 provides:
  (a) A debtor is insolvent if, at fair valuations, the sum of the debtor's debts is greater than all of the debtor's assets.
  (b) A debtor which is a partnership is insolvent if, at fair valuations, the sum of the partnership's debts is greater than the aggregate of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.
  (c) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.
  (d) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this chapter.
  (e) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

- Civil Code section 3439.01(a) provides:
  "Asset" means property of a debtor, but the term does not include, the following:
  (1) Property to the extent it is encumbered by a valid lien.
  (2) Property to the extent it is generally exempt under nonbankruptcy law.
  (3) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

- "To determine solvency, the value of a debtor's assets and debts are compared. By statutory definition, a debtor's assets exclude property that is exempt from judgment enforcement. Retirement accounts are generally exempt." (*Meija v. Reed* (2003) 31 Cal.4th 657, 670 [3 Cal.Rptr.3d 390, 74 P.3d 166], internal citations omitted.)

- "We conclude … that future child support payments should not be viewed as a debt under the UFTA." (*Meija, supra*, 31 Cal.4th at p. 671.)

4306. Presumption of Insolvency (*New*)

A debtor who is generally not paying [his/her/its] debts as they become due is presumed to be insolvent.

In determining whether [*name of debtor***] was generally not paying [his/her/its] debts as they became due, you may consider all of the following:**

(a) The number of [*name of debtor***]'s debts;**

(b) The percentage of debts that were not being paid;

(c) How long those debts remained unpaid;

(d) Whether legitimate disputes or other special circumstances explain any failure to pay the debts; and

(e) [*Name of debtor***]'s payment practices before the period of alleged nonpayment [and the payment practices of [***name of debtor***]'s [trade/ industry]]**

If [*name of plaintiff***] proves that [***name of debtor***] was generally not paying debts as they became due, then you should find [***name of debtor***] was insolvent unless [***name of defendant***] proves that [***name of debtor***] was solvent.**

Directions for Use

This instruction should be read in conjunction with CACI No. 4305, *Insolvency Explained*.

Sources and Authority

- Civil Code section 3439.02(c) provides: "A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent."
- The Legislative Committee Comment to Civil Code section 3439.02 states: "Subdivision (c) establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. … The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency as defined in subdivision (a) is more probable than its existence."
- The Legislative Committee Comment to Civil Code section 3439.02 states: "In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not

being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged."

4307. Affirmative Defense of Good Faith (Civ. Code, § 3439.08) (*New*)

[*Name of defendant***] claims [he/she/it] is not liable to [***name of plaintiff***] [on the claim for actual fraud] because [***name of defendant***] [***insert one of the following:***]**

[took the property from [*name of debtor***] in good faith and for a reasonably equivalent value]**

[or]

[received the property from someone who had taken the property from [*name of debtor***] in good faith and for a reasonably equivalent value.]**

To succeed on this defense, [*name of defendant***] must prove both of the following:**

[Use one of the following two sets of elements:]

[1. That [*name of defendant***] took the property from [***name of debtor***] in good faith; and**

2. That [he/she/it] took the property for a reasonably equivalent value.]

[or]

[1. That [*name of defendant***] received the property from [***name of third party***], who had taken the property from [***name of debtor***] in good faith; and**

2. That [*name of third party***] had taken the property for a reasonably equivalent value.]**

"Good faith" means that [[*name of defendant/ third party***] acted without actual fraudulent intent and that [he/she/it] did not conspire with [***name of debtor***] or otherwise actively participate in any fraudulent scheme. If you decide that [***name of debtor***] had fraudulent intent and that [***name of defendant/third party***] knew it, then you may consider [his/her/its] knowledge in combination with other facts on the question of [***name of defendant/third party***]'s good faith.**

Directions for Use

This instruction is appropriate in cases involving allegations of actual fraud under the Uniform Fraudulent Transfer Act. The bracketed language in the first paragraph is not necessary if the plaintiff is bringing a claim for actual fraud only.

Sources and Authority

- Civil Code section 3439.08 provides:

  (a) A transfer or an obligation is not voidable under paragraph (1) of subdivision (a) of Section 3439.04, against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.
  (b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under paragraph (1) of subdivision (a) of Section 3439.07, the creditor may recover judgment for the value of the asset transferred, as adjusted under subdivision (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against the following:
  (1) The first transferee of the asset or the person for whose benefit the transfer was made.
  (2) Any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.
  (c) If the judgment under subdivision (b) is based upon the value of the asset transferred, the judgment shall be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.
  (d) Notwithstanding voidability of a transfer or an obligation under this chapter, a good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to the following:
  (1) A lien on or a right to retain any interest in the asset transferred.
  (2) Enforcement of any obligation incurred.
  (3) A reduction in the amount of the liability on the judgment.
  (e) A transfer is not voidable under paragraph (2) of subdivision (a) of Section 3439.04 or Section 3439.05 if the transfer results from the following:
  (1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law.
  (2) Enforcement of a lien in a noncollusive manner and in compliance with applicable law, including Division 9 (commencing with Section 9101) of the Commercial Code, other than a retention of collateral under Sections 9620 and 9621 of the Commercial Code and other than a voluntary transfer of the collateral by the debtor to the lienor in satisfaction of all or part of the secured obligation.

- Civil Code section 3439.03 provides: "Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person."

"The Legislative Committee comment to Civil Code section 3439.08, subdivision (a), provides that 'good faith,' within the meaning of the provision, 'means that the transferee acted without actual fraudulent intent and that he or she did not collude with the debtor or otherwise actively participate in the fraudulent scheme of the debtor. The transferee's knowledge of the transferor's fraudulent intent may, in combination with other facts, be relevant on the issue of the transferee's

good faith . . . .' " (*Annod Corporation, v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924], internal citations omitted.)

4308. Statute of Limitations Defense—Actual and Constructive Fraud (Civ. Code, § 3439.09) (*New*)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time limit set by law.**

[[With respect to [*name of plaintiff***]'s claim based on actual fraud,] to succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***] did not file [his/her/its] lawsuit within four years after the [transfer was made/obligation was incurred] [or, if later than four years, within one year after the transfer or obligation was or could reasonably have been discovered by [***name of plaintiff***]. But in any event, the lawsuit must have been filed within seven years after the transfer was made or the obligation was incurred].]**

[[With respect to [*name of plaintiff***]'s claim based on constructive fraud,] to succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***] did not file [his/her/its] lawsuit within four years after the [transfer was made/obligation was incurred].]**

Directions for Use

Read the first bracketed paragraph regarding delayed discovery in cases involving actual fraud, and the second in cases involving constructive fraud. Do not read the first bracketed phrases unless the plaintiff has brought both actual and constructive fraud claims. This instruction applies to claims brought under the UFTA only.

Sources and Authority

- Civil Code section 3439.09 provides:
  A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought pursuant to subdivision (a) of Section 3439.07 or levy made as provided in subdivision (b) or (c) of Section 3439.07:
  (a) Under paragraph (1) of subdivision (a) of Section 3439.04, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant.
  (b) Under paragraph (2) of subdivision (a) of Section 3439.04 or Section 3439.05, within four years after the transfer was made or the obligation was incurred.
  (c) Notwithstanding any other provision of law, a cause of action with respect to a fraudulent transfer or obligation is extinguished if no action is brought or levy made within seven years after the transfer was made or the obligation was incurred.

- "[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked. They may also be attacked by, as it were, a common law action. If and as such an action is brought, the applicable statute of limitations is section 338 (d) and, more

importantly, the cause of action accrues not when the fraudulent transfer occurs but when the judgment against the debtor is secured (or maybe even later, depending upon the belated discovery issue)." (*Macedo v. Bosio* (2001) 86 Cal.App.4th 1044, 1051 [104 Cal.Rptr.2d 1].)

- "In the context of the scheme of law of which section 3934.09 is a part, where an alleged fraudulent transfer occurs while an action seeking to establish the underlying liability is pending, and where a judgment establishing the liability later becomes final, we construe the four-year limitation period, i.e., the language, 'four years after the transfer was made or the obligation was incurred,' " to accommodate a tolling until the underlying liability becomes fixed by a final judgment." (*Cortez v. Vogt* (1997) 52 Cal.App.4th 917, 920 [60 Cal.Rptr.2d 841].)